(2)

No. 91-2

Supreme Court, U.S.
FILED
AUG 23 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TRANSPORTES AEREOS MERCANTILES PAN AMERICANOS, S.A., a/k/a TAMPA AIRLINES,
Petitioner,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; DISTRICT 100, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

Of Counsel:
JEFFREY MANNERS
5805 Blue Lagoon Drive
Suite 400
Miami, FL 33126
(305) 264-4848

ALLISON BECK
MARK SCHNEIDER
(Counsel of Record)
1300 Connecticut Avenue, N.W.
Suite 810
Washington, D.C. 20036
(202) 857-5250
Attorneys for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
ARGUMENT	3
I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF ANY OTHER COURT	3
II. THE DECISION BELOW DECIDED NO IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT	7
CONCLUSION	11

TABLE OF AUTHORITIES

CASES — Page

Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969) 9

Chicago & North Western Ry Co. v. United Transportation Union, 402 U.S. 570 (1971) 6, 10

Consolidated Rail Corp. v. Railway Labor Executives' Association, 109 S.Ct. 2477 (1989) 10

Detroit & Toledo Shore Line Ry Co. v. United Transportation Union, 396 U.S. 142 (1969) ..... *passim*

Machinists v. Trans World Airlines, 839 F.2d 809 (D.C. Cir.), *amended on other grds.*, 848 F.2d 232 (D.C. Cir.), *cert. denied*, 488 U.S. 820 (1988) ..... *passim*

NLRB v. Katz, 369 U.S. 736 (1962) 9

Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executives Ass'n, 491 U.S. 490 (1989) 8-9

Regional Airlines Pilots Association v. Wings West Airlines, Inc., 915 F.2d 1399 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 2891 (1991) ..... *passim*

Union of Flight Attendants, Local No. 1 v. Air Micronesia, Inc., No. 85-0125 (Aug. 30, 1988), *aff'd*, unpublished slip op., No. 88-15754 (9th Cir. May 10, 1990) 7

Williams v. Jacksonville Terminal Co., 315 U.S. 386 (1942) ..... *passim*

STATUTES

National Labor Relations Act, 29 U.S.C. § 151 *et seq.* 9

Norris-LaGuardia Act, 29 U.S.C. § 104 *et seq.* 6, 9

Railway Labor Act, 45 U.S.C. § 151 *et seq.* ..... *passim*

45 U.S.C. § 152, First ..... *passim*

LEGISLATIVE MATERIAL

Hearings Before the House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess. (1926) 10-11

MISCELLANEOUS

Ninth Circuit Rule 36-3 7

Supreme Court Rule 10.1 (a) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-2

TRANSPORTES AEREOS MERCANTILES PAN AMERICANOS, S.A., a/k/a TAMPA AIRLINES,
Petitioner,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; DISTRICT 100, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case concerns a preliminary injunction requiring an employer to bargain in good faith with a newly-certified union representing certain of its employees, and to maintain previously negotiated terms and conditions of employment during that bargaining. Since petitioner concedes that its Statement of Facts is based upon an

affidavit whose factual assertions were rejected by the courts below, *see* Petition for Writ of *Certiorari* ("Petn") 5 n.4, a brief statement of the facts as found by the courts below would appear to be in order.

Petitioner Transportes Aereos Mercantiles Pan Americanos, S.A., a/k/a Tampa Airlines ("Tampa" or "Carrier") is an airline, and respondent District Lodge 100 of the International Association of Machinists and Aerospace Workers, AFL-CIO ("IAM" or "Union") is a union that has represented Tampa's fleet service employees since 1987. Prior to that time, these employees were represented by the Teamsters union. The employees' terms and conditions of employment were set by an unratified agreement between Tampa and the Teamsters that both parties, and the successor union, agreed to honor. These negotiated terms and conditions of employment constituted the status quo between the parties. App. 2a, App. 16a.[1]

In October 1987, Tampa and the IAM began bargaining over a new collective bargaining agreement. A few months after the bargaining commenced, Tampa discharged several union employees without regard to the seniority provisions in the unratified agreement, and refused to allow the Union to grieve those discharges, in further violation of that agreement. Tampa also discharged a union shop steward, admittedly a good employee, because "his position with the Union would not

[1] The court below found as a matter of fact that this unratified agreement "contained the existing rates of pay, rules and working conditions, *i.e.*, the status quo." App. 2a. Despite this finding of fact, petitioner premises its argument to this Court upon the assertion that there was no fixed status quo, and as a matter of fact it remained free to change employment terms unilaterally, relying upon an affidavit submitted to the district court claiming that its "right [to make unilateral changes] has never been relinquished or restricted by a collective bargaining agreement." App. 34a. The affidavit and its claim were discounted by both courts below. App. 2a & n.2; App. 16a.

be tolerated . . . [and] the airline would not respect the union, its members, or its rights." District Court Findings of Fact ¶¶ 6-7, App. 16a.

In 1989, Tampa ceased bargaining with the Union altogether, and unilaterally canceled or reduced benefits and bonuses that were part of the previous agreement, notwithstanding its prior acknowledgment of the status quo. App. 16a-17a.

The Union then filed suit in federal district court seeking an injunction under the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA"), to require Tampa to bargain in good faith, and to restore the status quo—the fixed terms and conditions of employment that existed prior to Tampa's unilateral actions.

The district court granted preliminary relief, and ordered Tampa to bargain in good faith with the Union. It also ordered Tampa to restore the grievance and arbitration procedure, to resolve through expedited arbitration the discharges of union employees fired as a result of their union allegiances, and in all other respects to honor the agreed-upon terms and conditions of employment in place before the start of bargaining. The Court of Appeals for the Eleventh Circuit accepted the district court's findings of fact in their entirety and affirmed the grant of preliminary relief.

ARGUMENT

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF ANY OTHER COURT

Tampa maintains that the Eleventh Circuit has taken insufficient account of this Court's decision in *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942), and that its decision is inconsistent with the decisions in *Machinists v. Trans World Airlines*, 839 F.2d 809 (D.C. Cir.), *amended on other grds.*, 848 F.2d 232 (D.C. Cir.), *cert. denied*, 488 U.S. 820 (1988) *("TWA")*, and *Re-*

gional Airlines Pilots Association v. Wings West Airlines, Inc., 915 F.2d 1399 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 2891 (1991) *("Wings West")*. That contention is based on a gross overreading of *Williams*, and the creation of a conflict with *TWA* and *Wings West* that does not exist.

In *Williams* a carrier made unilateral changes in employment terms *before* commencing to bargain with a newly certified union. Moreover, the preexisting terms were "made by the carrier for its own convenience and purpose." *Williams*, 315 U.S. at 403. The *Williams* Court ruled that in such a situation "pending . . . negotiations, where no collective bargaining agreements are or have been in effect," the carrier does not violate the status quo provisions of the Act by making unilateral changes. 315 U.S. at 402. Any argument that *Williams* was intended to have some broader application was put to rest in this Court's subsequent decision in *Detroit & Toledo Shore Line Ry Co. v. United Transportation Union*, 396 U.S. 142, 152 (1969) (*"Shore Line"*) which held *Williams* to countenance unilateral changes only where there is "absolutely no prior history of collective bargaining or agreement between the parties on any matter." 396 U.S. at 158.

As the Eleventh Circuit correctly understood, this case arises in a different factual context. Here, the lower courts found as a matter of fact that *"bargaining involving the IAM had already occurred at the time Tampa Airlines made the unilateral changes."* Decision of the Court of Appeals, App. 8a (emphasis added). Moreover, here there existed *prior terms and conditions set by negotiation* between Tampa and its union, and "Tampa Airlines informed the IAM that the prior unratified agreement represented the status quo." *Id.* For both of these reasons, the court of appeals correctly understood that "the instant case is not controlled by *Williams*." *Id.*

Nor does the decision below conflict with the Ninth Circuit's *Wings West* decision or the *TWA* decision of the D.C. Circuit. In contrast to this case, *TWA* and *Wings West* arose on facts indistinguishable from those in *Williams*. Not surprisingly, in both instances the lower courts declined to enjoin the carrier's unilateral actions precisely because of the absence of ongoing bargaining and a previously fixed status quo.

To set these differences in concrete terms, in *Wings West* and *TWA* relief was denied to newly certified unions seeking to enjoin changes in conditions of employment unilaterally implemented after certification because the changes took place *before any bargaining had begun. See Wings West* at 1403 ("Here, as in the D.C. Circuit case [TWA], no steps toward bargaining . . . had been undertaken. . . . [No injunctive relief is warranted] under the facts of this case where there has been no negotiation process instituted at all."); *TWA* at 814 (no violation where there is " 'absolutely no prior history of any collective bargaining or agreement between the parties on any matter' " (citing *Williams* at 158)); *id.* at 815 (no injunction warranted where "the first steps [i.e., negotiations] have not yet been taken").

And in both *Wings West* and *TWA*, there were no preexisting fixed terms and conditions of employment set by negotiation with the carriers' unions that could be subject to a status quo obligation. In both instances—as in most new certification situations—the preexisting terms were set unilaterally by management, and so arguably were subject to change at management's discretion. Thus the *Wings West* and the *TWA* decisions declined to find that the carriers' unilateral actions violated the Act. *Wings West*, 915 at 1401 ("since no collective bargaining agreement had ever been in effect, [Wings West] was entitled to exercise its management prerogative of changing working conditions"); *TWA*, 839 F.2d at 814 ("no power

to enjoin unilaeral changes in working conditions by management . . . in the absence of pre-existing, in place, collective bargaining agreements").

While Tamps continues to argue that here, too, there was no pre-existing status quo, both the trial court and the Eleventh Circuit rejected this argument *as a matter of fact.* The split Tampa alleges thus depends entirely on its rejection of the lower courts' contrary findings of fact. But the findings of both lower courts in this regard are dispositive, and those findings distinguish this case from the other decided cases.

In sum, far from being in conflict with the decided cases, the decision below merely highlights a legal principle already explicit in the few other decided cases in this area: when there is either (1) a preexisting agreement, or (2) ongoing bargaining, it violates the status quo obligation implicit in § 2, First, to make unilateral changes.[2]

---

[2] As the court below recognized, to the extent there is any tension at all among the decided cases, it concerns the propriety of awarding injunctive relief to remedy violations of § 2, First. App. 11a. *Certiorari* is not warranted to address this remedy issue.

First, petitioner does not seek *certiorari* on this remedy question. *See* Petn i (Question Presented).

Second, to repeat, the differing treatment is explained by the different facts of the cases: in *Tampa* the bargaining had already been infected by the unilateral actions, so injunctive relief was deemed necessary to remedy the violation, while in *Wings West* and *TWA*, since the parties had never begun bargaining, the courts ruled that the injunctive request was premature.

Finally, the legality of an injunction in a labor dispute involves the application of well-settled law under the Norris-LaGuardia Act, 29 U.S.C. § 104 *et seq.* In ruling as they did, each court of appeals accordingly relied on this Court's decision in *Chicago & N.W. Ry.* v. *UTU*, 402 U.S. 570, 583 (1971), which in relevant part interpreted the limitations on federal court jurisdiction imposed by the Norris-LaGuardia Act. *See Wings West*, 915 F.2d at 1403, *TWA*, 839 F.2d at 815, *Tampa* at App. 11a, each citing *Chicago & N.W. Ry.*, 402 U.S. at 582-583. The Norris-LaGuardia Act principles governing resolution of these claims are well settled,

Given the absence of any disagreement among the courts of appeals which might justify review, it is not surprising that this Court recently denied the *certiorari* petition in the *Wings West* case brought to resolve the same alleged "conflict" between the Ninth and the Eleventh Circuit decisions that forms the basis for the instant petition. *See* No. 90-1714, *Regional Airline Pilot Association v. Wings West Airlines, Inc.*, Petition for Certiorari 8-11, *cert. denied*, 111 S.Ct. 2891 (June 28, 1991). Nothing in the intervening two months calls into question the Court's judgment that this issue does not merit review.[3]

II. THE DECISION BELOW DECIDED NO IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT

A. Absent any conflicting decisions in this area, nothing about this case merits this Court's consideration. Issues concerning application of the RLA's status quo requirements to newly certified bargaining units arise very infrequently—respondent is aware of only five cases since the Act's passage in 1926. While this Court's prior decision in *Williams* has been criticized in subsequent deci-

---

correctly identified by all of the courts of appeals, incuding the court below, and do not merit revisiting by this Court. Moreover, the Norris-LaGuardia Act was not argued below as a reason to deny the injunction.

[3] Petitioner also points to an alleged conflict with an unpublished opinion of the District of Hawaii, *Union of Flight Attendants, Local No. 1 v. Air Micronesia, Inc.*, No. 85-0125 (Aug. 30, 1988). J.A. 36a-52a. *Air Micronesia* is distinguishable from the instant case because here there exist previously bargained terms and conditions which establish the status quo, whereas in *Air Micronesia* there were no such prior agreements. In any event, decisions of federal district courts that may conflict with decisions of Courts of Appeals do not create conflicts that are a ground for review by this Court. Supreme Court Rule 10.1(a). The unpublished *per curiam* affirmance of that decision is without precedential value under the rules of the 9th Circulit. *See* J.A. 53a, n.*, Ninth Circuit Rule 36-3.

sions, this petition—unlike the petition recently denied in *Wings West*—would not provide the Court a vehicle to reconsider *Williams*, even if it were so inclined. As indicated above, the existence of mutually agreed-upon terms and conditions that the carrier admitted constituted the status quo distinguishes this case from *Williams* and from all of the other decided cases. Indeed, the highly unusual facts of this case, involving a prior bargaining relationship between the Teamsters and Tampa, an agreement between those parties to honor most of the provisions of an unsigned agreement, and a successor relationship between the Teamsters and the Machinists, make this case *sui generis*.

Moreover, these unique facts raise collateral legal and factual issues of no importance beyond the contours of this case that would need to be resolved before the Court could decide this case on the merits. These issues include, for example: whether this particular honored but unratified agreement was a labor agreement under the RLA, and if not, what is the significance of the agreement; and whether it is legally significant that the unratified agreement was with a predecessor union rather than with the IAM. *See* Petn 14. Because the factual record relevant to these issues is sparse or nonexistent, even if the Court were otherwise inclined to involve itself in this dispute, the state of the record would frustrate its resolution. The case is fact-bound and comes to the Court on a poor record.

B. Petitioner nevertheless asserts that the decision below "improperly expanded" this Court's prior decision in *Shore Line* in violation of this Court's instruction in *Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executives Ass'n*, 491 U.S. 490 (1989) ("*P&LE*"), improperly relied upon precedents developed under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"), and misconstrued § 2, First, of the RLA. These claims

are makeweights; none merit review in the context of this fact-bound decision.

i. The decision below does not rest on the *Shore Line* decision but on a series of cases interpreting the status quo provisions of the Act, and in particular on the very decisions petitioner claims conflict with the decision below. And nothing in the decision below concerns the issues common to *Shore Line* and *P&LE*.[4]

ii. Nor did the court below improperly rely on NLRA precedents in reaching its conclusion. This Court has long sanctioned consideration of NLRA precedents "for assistance in construing the Railway Labor Act," *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969). The court of appeals in this regard merely recognized that unilateral actions undertaken in the course of bargaining have the same destabilizing effect on negotiations whether such actions occur in industries covered by the RLA or in industries covered by the NLRA, and that *NLRB v. Katz*, 369 U.S. 736 (1962), explicitly identifies that destabilizing effect in the NLRA context.

iii. Finally, the decision below does not depart from the settled law under the RLA and under the Norris-LaGuardia Act. This Court has already recognized: that Congress intended the RLA's status quo requirement to be in place from the beginning of a major dispute until the time the parties are released by the National Media-

---

[4] Both *P&LE* and *Shore Line* focus on whether § 6 of the Act forbids changes in any objective working condition, as *Shore Line* holds, or only changes in mutually-agreed upon or recognized conditions, as *P&LE* suggests. Petitioner asserts that this case concerns imposition of the status quo to conditions that were previously subject to management's sole discretion, and is thereby in tension with this Court's decision in *P&LE*. But, to repeat, *both lower courts* found that the previous terms and conditions derived from an agreement between Tampa and its unions. The issue petitioner seeks to raise does not arise under the facts of this case as found by both lower courts.

tion Board;[5] that § 2, First, is part of "an integrated, harmonious scheme for preserving the status quo from the beginning of the major dispute through the final 30-day 'cooling off' period;"[6] and that in appropriate circumstances courts may issue injunctions to enforce § 2, First.[7] *Williams*, as all the lower courts have recognized, *supra*, simply declared that these principles do not govern with full force when there are no fixed mutually agreed upon terms and conditions as to which a status quo obligation might apply, and when the unilateral changes are made before any bargaining has taken place. *Williams*, 315 U.S. at 402; *Shore Line*, 396 U.S. at 158.[8]

---

[5] *See, e.g., Consolidated Rail Corp. v. Railway Labor Executives Association*, 109 S.Ct. 2477, 2480 (1989). It is not contested that this is a "major dispute" under the Act. *See* App. 5a, n. 3. A "major dispute" is a dispute over the creation of contract rights. *See, e.g., id.* at 2480.

[6] *Shore Line*, 396 U.S. at 152; *see also Conrail*, 109 S.Ct. at 2481 n. 5.

[7] *Chicago & N.W. Ry.*, 402 U.S. 570.

[8] The relevant legislative history directly supports the decision below. The Act was drafted by railroad and union representatives, and their testimony as to its purposes "is entitled to great weight in the construction of the Act." *Chicago & N.W. Ry.*, 402 U.S. at 576 & n. 7. Donald Richberg was the "union representative when the proposed legislation was presented to Congress jointly by the railroads and the unions." *Shore Line* at 151 n. 18. Mr. Richberg made clear that "[a]s to maintaining the status quo from the time that a dispute is engendered, it is a violation of the duties imposed by this law for either party to take any action to arbitrarily change the conditions until that dispute has been adjusted in accordance with the law." And he took pains to make clear that the definition of "dispute" was to be broadly understood to include *any* dispute, "such as, for example . . . a disagreement over the original agreement before any agreement was made." Statement of Donald Richberg, hearings Before the House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess. (1926), *reprinted in* Sloan, ed., I American Landmark Legislation, The Railway Labor Act of 1926, 219, 240. Richberg made clear that it was the drafters' intention that the status quo "shall

While petitioner finally urges that the lengthy bargaining process and concomitant status quo obligations of the RLA are unfair to carriers and create disincentives to settle on the part of the party that would like "to keep favorable practice in place," Pet. 19, these policy concerns —which are in no way limited to bargaining in newly certified units—are more properly directed at the Legislature, not to this Court.

CONCLUSION

For the foregoing reasons, the petition for *certiorari* should be denied.

Respectfully submitted,

Of Counsel:
JEFFREY MANNERS
5805 Blue Lagoon Drive
Suite 400
Miami, FL 33126
(305) 264-4848

ALLISON BECK
MARK SCHNEIDER
(Counsel of Record)
1300 Connecticut Avenue, N.W.
Suite 810
Washington, D.C. 20036
(202) 857-5250
Attorneys for Respondents

---

not be altered during the entire period of utilization of this law." *Id.* at 93.